No. 91-886

In The

Supreme Court of the United States

October Term, 1992

BOB REVES, ROBERT H. GIBBS, and FRANCES GRAHAM, As Representatives Of A Class Of Note Holders,

Petitioners,

v.

ERNST & YOUNG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

ROBERT R. CLOAR
Court Plaza, Suite 102
51 South 6th Street
Fort Smith, Arkansas 72901
(501) 783-1186

GARY M. ELDEN*
JOHN R. MCCAMBRIDGE
JAY R. HOFFMAN
GRIPPO & ELDEN
227 West Monroe Street
Chicago, Illinois 60606
(312) 704-7700

Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MISCELLANEOUS

REPLY OF PETITIONERS

We reply to three arguments raised by the briefs of Arthur Young and its amici: (I) legally, whether RICO should be read to exempt auditors (or any other class of outsiders); (II) factually, whether Arthur Young did nothing more than engage in "traditional auditing activities"; and (III) whether Arthur Young can now advance two issues not set forth in any petition for certiorari and not decided by either court below.

I. SECTION 1962(C) DOES NOT EXEMPT AUDITORS (OR ANY OTHER CLASS OF OUTSIDERS) FROM RICO LIABILITY.

A. Arthur Young's Request For An Auditors' Exemption

Arthur Young pays lip service to the Eighth Circuit's "management or operation" test but makes no effort to apply the test to this case or to any other set of facts. Arthur Young fails to do so because, as we pointed out already, the Eighth Circuit's test will not catch the outside attorney who bribes the prosecutor's office[1] or the "smallest fish" and "foot soldiers" that Arthur Young concedes should be netted by 18 U.S.C. § 1962(c). (AY Br. 24.) Arthur Young therefore asks the Court to fashion a rule solely for auditors, arguing that "outside accountants who limit their involvement with a client to traditional auditing activities" should be *exempt* from RICO liability. (AY Br. 18.) Amicus AICPA supports Arthur

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[1] *United States v. Yonan*, 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).

Young's request for an auditors' exemption, while amicus AFL-CIO seeks an exemption for unions.

The proposed exemptions, like the Eighth Circuit's test, are at odds with the plain words and purpose of section 1962(c) and should not be granted. The impropriety of the proposed exemption (and the Eighth Circuit's test) is highlighted by recalling Arthur Young's conduct here: the jury, the district court and the Eighth Circuit all agreed that Arthur Young, *using* its position as the *auditor* for the Co-Op and *acting alone*, originated a multimillion dollar securities fraud and maintained it for nearly three years, causing tremendous damage to thousands of innocent persons. Moreover, neither Arthur Young nor its amici explain why the same reasoning would not give exemptions to every class of "outsiders," including lawyers fraudulently doing "traditional" legal work and appraisers fraudulently preparing "traditional" valuations.

Additional evidence that the proposed auditors' exemption would be improper is provided by the contradictory arguments made by Arthur Young and its amici. AICPA and AFL-CIO base their exemption arguments exclusively on the statutory noun "conduct," which they believe means "control." For example, AICPA argues that, in *Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991) ("*Yellow Bus*"), the D.C. Circuit "adopted in substantially identical form the standard announced in *Bennett*." The AICPA then approvingly states that the *Yellow Bus* holding requires a plaintiff to prove that the defendant "exercised significant *control* over or within an enterprise. . . . " (AICPA Br. 19

(emphasis added).) Similarly, the district judge in this case believed that the "management or operation" test set forth in *Bennett v. Berg*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983) required us to prove that Arthur Young controlled the Co-Op. He concluded that Arthur Young did not and entered summary judgment against us. (JA 198-200.)

Arthur Young parts company with the district judge, the D.C. Circuit, and its own amici on the "conduct means control" issue. It urges that *Yellow Bus*, with its focus on "control," misapprehends both *Bennett* and RICO. Indeed, Arthur Young agrees with us that applying the veneer of "control" to the noun "conduct" is plainly wrong, given the dictionary definitions of "conduct" and the congressional admonition to construe RICO liberally. Arthur Young also claims that our discussion of the "control" issue was a "red herring" and accuses us of unfairly pretending that such arguments are even at issue. (AY Br. 19-22.)

Still at odds with its amici, Arthur Young then denigrates the importance of dictionary definitions of "conduct" (which it concedes support us). Arthur Young "doubts their utility in this case" and "see[s] little purpose" in "engaging [us] in a 'battle of the dictionaries.' " (AY Br. 21-23, esp. n.14.) Moreover, Arthur Young agrees with us that section 1962(c) liability extends to those who merely "share" in the "conduct" of "affairs" (AY Br. 23), to "foot soldiers" and the "smallest fish" (AY Br. 24), and to those who are not enterprise "insiders" (AY Br. 23, 49). Indeed, Arthur Young generally concedes that "Congress intended to use 'terms of breadth' in RICO and for those terms to be 'liberally construed. . . . ' " (AY Br. 47.)

B. Section 1962(c) Cannot Be Interpreted To Provide An Exemption For Auditors.

Having conceded the points identified in A, above (as well as other points that we discuss later), Arthur Young tries to recover by placing all of its forensic eggs in one basket – the legislative history of RICO. But Arthur Young loses this fight on two grounds. First, Arthur Young cannot even use the legislative history because the statutory language covering the "participation" element of section 1962(c) has a plain meaning that is unambiguous, and there is no clearly expressed legislative intent to the contrary. Accordingly, the statutory language is conclusive. *Russello v. United States*, 464 U.S. 16, 20 (1983), citing *United States v. Turkette*, 452 U.S. 576, 580 (1981), quoting from *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Second, the legislative history does not support Arthur Young's argument that auditors are exempt from RICO liability. In fact, as Arthur Young concedes, Congress expressly recognized that accountants and auditors *could* be reached under RICO. (AY Br. 34 n.20.)

In reviewing the arguments made and opinions cited by all briefwriters on the issue of statutory interpretation, we note that the Court has approved as many as six guides on the subject, four primary because they look to the language of the statute (A-D, below) and two secondary because they may come into play (if at all) only if the statutory language is ambiguous (E-F, below). We now try to answer everyone's arguments through an attempted restatement and application of the Court's prior teachings on statutory interpretation. In doing so, we discuss both

general reasons for (and limitations on) the use of each guide and its specific application to the proposed auditor exemption.

(A) *Dictionary definitions* were known to the members of Congress, staff, lobbyists, and other technical experts who helped choose RICO's language, and to the President who signed the bill into law. They have the further advantage of accessibility to all citizens, who after all should be able to understand their country's statutes as citizens, as jurors, and as voters who evaluate the officials enacting the statutes. Dictionary definitions should converge with prior judicial interpretations (see B, below) since dictionaries (especially law dictionaries) are supposed to reflect usage (including judicial usage) and judges generally do (and should) use words in accord with their dictionary meanings.

(B) *Prior judicial interpretations* of statutory words also were accessible to statute-makers, who would have had every reason to expect courts to continue to interpret the same words in the same way and therefore presumably intended that to happen. Continuing the interpretations not only therefore respects original legislative intent, but also aids lawyers and judges trying to interpret the new law. If the contrary occurs, *i.e.*, if the same word is given a different meaning in a similar statute, confusion can result, especially when both statutes are involved in the same matter (*e.g.*, instructing a jury). Without good reason, courts should not impute to statute-makers the intent to create such anomalies.

In this case, Arthur Young (and its amici) nowhere dispute our arguments that the dictionary definitions and

judicial interpretations confirm the plain meaning of "participate," "directly or indirectly," and "affairs." In particular, no one disputes that "participate" has a settled, precise meaning and use in legal contexts ancestral to RICO; that it there exists to impose liability on those who merely "assist," "have a part" or "share" in misconduct largely initiated or advanced by others. At the time RICO was adopted, this meaning of "participate" was settled not only in the federal securities cases we earlier noted, but in numerous state court cases as well. *See* J. Wolens, *"Hidden Gold" in the Blue Skies Laws*, 20 Sw. L.J. 578 (1966) (collecting cases); G. Elden, *Litigation Under Illinois Securities Law*, 60 Ill. B.J. 28 (1971); *Davis v. Walker*, 104 N.W.2d 479, 490 (Neb. 1960); *Wharton v. Fidelity-Baltimore Nat'l Bank*, 158 A.2d 887, 893 (Md. 1960); *Kansas City v. Caresio*, 447 S.W.2d 535, 537 (Mo. 1969).

Arthur Young (but not its amici) concedes that "conduct" (particularly in light of (C) and (D), below) can and should be given its plain, broad meaning (*i.e.*, as equivalent to "carrying out" or "carrying on"). In light of these concessions, Arthur Young must agree that the "participation" element of section 1962(c) uses the words of everyday English broadly and in a way that non-lawyers understand. Accordingly, Arthur Young must also agree that it should not have received summary judgment if there is evidence that it shared or assisted, even if indirectly, in carrying on any aspect of the Co-Op's affairs.

(C) *Context* is also important: on this, all briefwriters agree. Presumably those who choose a statute's words do not intend one of them to nullify or render superfluous another. Moreover, no sensible person can deny that a word's meaning is influenced by surrounding

words. Here "conduct" is surrounded by words which (all admit) have about as great a breadth as statutory words can have. Thus. even if "conduct" implied some element of "control," the statute would require only a "participation" in that control, such participation could be "indirect," and it could pertain to any of the "affairs" of the enterprise.

Moreover, unless a "pattern" of bribes, extortion, or fraud at least sometimes amounts to indirect participation in the "conduct" of "affairs," RICO will not apply to most predicate acts. Thus, to take plausible cases, RICO seems designed to cover X if X repeatedly bribes state commissioners to influence their decisions, or repeatedly threatens an officer of a company to cause the company to pay X money. Does it aid a court's analysis to ask, in these cases, whether X "controls" the commission or the company? We submit it is clearer and truer to statutory expression to analyze directly whether X has "participated" in the "conduct" of those enterprise's "affairs."

We also refer the Court to another section of RICO itself (section 1962(b)) for proof that Congress knew how to use the word "control" when it wanted to do so. (Section 1962(b) punishes anyone who, through a pattern of racketeering acts, acquires or maintains "control of" an enterprise.) Similarly, Congress has for years distinguished between "participant" and "controlling person" liability in the securities laws (which are incorporated into RICO). The main lesson of considering these provisions is that Congress deliberately chose *not* to say "control" (or "operation" or "management") in section 1962(c), and chose a broader word intentionally.

(D) *The purpose* of section 1962(c), as inferred from its language, is not to amplify *all* penalties and liabilities under predicate acts but to do so only against certain persons. For example, even though the enterprise itself may be a principal wrongdoer, it is not subject (at least by section 1962(c)) to RICO liabilities. Liabilities do attach, however, to those who merely "participate" "indirectly" in the "conduct" of that same enterprise's "affairs" through prohibited means. Given its plain words, section 1962(c) is designed to increase punishment and liability not just for insiders who use power they inherently have, but for outsiders (like Arthur Young here) who expand their own power to commit illegal acts by participation in a larger enterprise.

(E) *Formal legislative history*, such as a Senate report, may be considered when the language of the statute itself is ambiguous. This can be worth doing since the history is written contemporaneously by some of the people adopting the statute. But "some" is the problem. Had the original bill been worded to include the Senate report's language, would it have been amended in conference? passed the House? been vetoed? been supplemented by other provisions? been amended the next year? been held unconstitutional? Moreover, the statute's language may have changed *after* the report was written (which actually happened to the precise words at issue; *see* AFL-CIO Br. 18, 20) so that the legislative comments would not anticipate any alteration. (In any event, the legislative history specifically contemplates extending RICO to accountants or auditors.)

(F) Finally, the actions of *subsequent Congresses* can be of some utility when a party pressing for an exemption from the Court has previously sought similar relief from

Congress and left empty-handed. In this instance, AICPA has unsuccessfully lobbied Congress for the equivalent of an auditors' exemption from RICO.[2]

* * *

Taken together, these factors preclude judicial creation of an auditors' exemption from RICO. The statutory words, context, and purpose are too broad to permit any such sweeping limitation. The legislative history, though indeterminate (perhaps inherently), on balance suggests no such exemption was intended.

In sum, there is no basis to restrict the application of section 1962(c) by selecting the most narrow definitions of the word "conduct" and then using the narrow definition of that single word to cut back dramatically on the broad and plain "participation" phrase actually chosen by Congress. As we show below, Arthur Young's response offers additional support for the proposition that Arthur Young *did* "participate," "directly or indirectly," in the "conduct" of the Co-Op's "affairs."

II. ARTHUR YOUNG PARTICIPATED IN THE CONDUCT OF THE CO-OP'S AFFAIRS.

A. The Co-Op's "Affairs" Include The Preparation Of Its Pre-Audit Financial Statements.

Some of Arthur Young's most telling concessions occur when it describes the role of the textbook auditor

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[2] *E.g., Proposed RICO Reform Legislation: Hearings on S.1523 Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 3-6 (1985) (statement of AICPA's Chairman); *see also RICO Reform Act: Hearing on S.438 Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 186-87 (1987) (AFL-CIO's statement regarding unions).

(a role that Arthur Young did *not* play here). The textbook (or "traditional") auditor "simply expresses an opinion on the *client's* financial statements." (AY Br. 30.) He or she opines only on whether financial facts "have been fairly presented . . . in the financial statements *issued by management*." (*Id.*) " 'The financial statements are *management's responsibility*. The auditor's responsibility is to express an opinion on [them].' " (AY Br. 31-32.) "What an auditor does – and the *most* that an auditor is *permitted* to do and still be considered independent – is test the transactions of the client *as reflected in the client's books and records* . . . ." (AY Br. 35 (emphases added).)

In addition, if an accountant drafts a client's financial statements, "the *client* must be sufficiently *knowledgeable* of the enterprise's activities and financial condition and the *applicable accounting principles* so that he can reasonably accept" responsibility for the statements. AICPA Rule 101-3, in *AICPA Accounting Standards* ET § 101.05, at 4413.

Finally, an auditor who helps draft financial statements cannot turn around and audit accounting decisions he has made:

> [A]pplication of an independent viewpoint is particularly important with respect to judgment exercised in the *determination of appropriate principles and methods* applicable to the recording, classification, and presentation of financial data. By their nature such *judgments cannot subsequently be evaluated on an impartial and objective basis by the same accountant who made them.*

Codification of Reporting Policies, 6 Fed. Sec. L. Rep. (CCH) ¶38,335, at 38,590 (1986) (emphasis added); *see also In re*

Thomas P. Reynolds Securities, Ltd., Sec. Ex. Act Release No. 29689, at 4 (Sept. 16, 1991) ("A company may, of course, rely on an outside firm to prepare its books of accounts and financial statements. However, once an accounting firm performs those functions, it has become identified with management and may not perform an audit.")[3]

So even the authorities relied upon by Arthur Young hold that it was part of the *Co-Op's* "affairs" to decide upon appropriate accounting principles, methods, and facts such as whether the Co-Op built or bought the gasohol plant, what it cost, and whether it had to be written down. Since Arthur Young did those things *on its own*, it plainly participated in the "conduct" of the Co-Op's affairs to that extent.

B. Arthur Young Did Not Perform Traditional Auditing Activities And Nothing More.

Even if the "traditional auditing activities" test offered by Arthur Young were proper, Arthur Young

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[3] In short, an auditor cannot become a Gilbert and Sullivan parody by auditing himself:

> Pooh-Bah: [A]s Pay-master-General, I could so cook the accounts . . . that as Lord High Auditor I should never discover the fraud. But then, as Archbishop of Titipu, it would be my duty to denounce my dishonesty. . . .
>
> Ko-Ko: That's extremely awkward.

The Mikado, Act I, Sc. I (1885).

plainly would fail it here. First, there is the unrebutted expert evidence regarding Arthur Young's wholesale failure to comply with the AICPA's own Generally Accepted Auditing Standards ("Standards"), of which there are only ten. At trial, an audit partner from Touche Ross & Co. testified as an expert witness that Arthur Young violated at least *six* of the ten Standards. (Trans. XIV:157; *see also id.* at 158-222 (explaining conclusions).) Significantly, Arthur Young did not offer any expert from its own ranks, from another major accounting firm, from AICPA, or from anywhere else to testify that it had met the standards of the auditing profession.

Next, Arthur Young is forced to concede so many of the principal facts[4] that it eventually rests its case that it was a "mere auditor" on four demonstrably false propositions: (1) that the Co-Op's financial statements (which Arthur Young admits it prepared (AY Br. 8)) "were *based on the records* maintained by the Co-Op itself or its subsidiary, White Flame" (AY Br. 8 (emphasis added); *see also id.* 32); (2) that Arthur Young's "audit judgments were reached after consultation" with Co-Op management,

[4] In addition to the huge number of facts (Pet. Br. 6-18) conceded by silence, Arthur Young affirmatively agrees that: White and Dooley invested their *own* funds *in 1979* to build a gasohol plant, which developed huge problems by 1980, when it was worth only $444,000 to $1,500,000 (AY Br. 4-5); AY booked the plant at $4,500,000, creating a positive net worth of $2,600,000 (AY Br. 12); and by putting those numbers without explanation into condensed financial statements handed out to Co-Op members at the annual meetings, the members were materially misled (AY Br. 12-13).

notably Jack White and Kirit Goradia (AY Br. 8 n.7, relying exclusively on Drozal's testimony, Trans. IX:227-29); (3) that Arthur Young put the board on "full notice" of the Co-Op's financial condition (AY Br. 6, 10-11); and (4) that Arthur Young was not involved in the sale of demand notes (AY Br. 3).[5]

(1) *'Based on the records.'* Arthur Young admits that it created the Co-Op's financial statements. Nevertheless, Arthur Young seeks to absolve itself of responsibility by asserting that its financial statements "were based on the records maintained by the Co-Op itself or its subsidiary, White Flame Fuels." (AY Br. 8.)

In fact, before Arthur Young became involved with the Co-Op in 1981, the gasohol plant had never appeared on any Co-Op financial document as a Co-Op asset. Indeed all company records, and numerous critical ones (tax returns, minutes, third-party documents), showed that the Co-Op did not own the plant in 1979 and

[5] Arthur Young criticizes the Class for relying on the trial record (AY Br. 1-2 & n.1) and then proceeds throughout its brief to cite almost exclusively to that record, as both parties have done in every prior appellate brief and as the courts below have done in every prior opinion. The reason all counsel cite the trial record is that after the close of all evidence and before the jury retired, plaintiffs specifically made the trial record part of the summary judgment record by asking the district court to reconsider the prior summary judgment ruling on the RICO claim based on the entire record to the end of trial. The district court agreed to do so ("I'm going to go ahead and rule on that" (Trans. XV:49)) and then, as expected, reaffirmed his decision against the Class ("RICO is not going to go to the jury" (*id.* at 51)). The understandable goal was to create a single record for all issues on appeal.

acquired it in 1980. (Pet. Br. 11 n.6.) Far from basing anything on those documents, Arthur Young in disregard of them created the "blatant fiction" (CAJA 154-55) that the Co-Op had always owned the plant. At trial, Arthur Young tried to justify that fiction *not* by claiming that it was based on Co-Op records, but by asserting that it was based on Arthur Young's own view of "economic realities."

This implausible argument was rejected by the jury and the courts below. The entire record supports the Eighth Circuit's summary: "Arthur Young was the *source* of some of the information that was *not disclosed*, *e.g.*, the assumption about the Co-Op always having owned White Flame . . . ." (JA 304 (emphasis added).)

Also, the financial statements Arthur Young created contradicted all Co-Op records relating to recoverability of the "cost" of the gasohol plant. Co-Op records showed that the plant would never cover even its operating expenses (Pet. Br. 13-14 & n.7), which fact required a writedown of the plant from its cost value to its net realizable value. Arthur Young unilaterally decided not to write down the plant.[6]

Finally, Drozal under oath admitted that he derived the ridiculously-inflated $4,300,000 cost figure. That is true even though, as Arthur Young now admits (and – incredibly – tries to use affirmatively), Drozal blatantly

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[6] This is a good place to correct a mistake in our earlier brief: Kuykendall was an outside accountant and auditor. At Pet. Br. 3, we called him an internal accountant. Arthur Young (AY Br. 8 n.7) repeats this erroneous description as well.

lied about *how and why* he did so (not *whether* he did so). (*See* AY Br. 8 n.7.)

(2) *'After consultation' with White and Goradia.* While Drozal (Arthur Young's partner-in-charge) testified that he spoke with or interviewed White, Goradia, and unnamed persons at the gasohol plant, he did not claim (as Arthur Young now does) that he discussed Arthur Young's "audit judgments" with them. (*See* Trans. IX:227-29.)

Drozal admitted that he knew that he could not rely on White ("If he told me it was raining outside, I'd look out the window."). (*Id.* 230.) Neither Goradia nor White ever told Drozal that the Co-Op had always owned the plant; indeed, White's records and the "friendly lawsuit" said the opposite. Neither person said the plant should not be written down – neither was consulted on this. Goradia never said the plant cost $4,300,000 to build; indeed, he refused in writing to sign a standard client representations letter (*i.e.*, refused to take responsibility for the accuracy of any of the Co-Op's financial statements or records). (JA 254.)

(3) *'Full notice' to the Board.* The jury, the district court, and the Eighth Circuit all concluded that Arthur Young failed to disclose material facts to the Co-Op's members, management, and board. (*See* JA 304.) The case was tried, decided, and affirmed as a nondisclosure case. (JA 299.) It is thus established (or, at the least, there is a genuine issue of fact) that: the Co-Op was insolvent; Arthur Young itself prepared statements that concealed the insolvency; to do so, it "originated" the fraud here; it never disclosed its key unilateral financial decisions; it

created records for the Co-Op materially contrary to what Arthur Young knew to be true; it misled members at two annual meetings; it deceived a government agency, the USDA; and no one else participated in these concealments because no one but Arthur Young even knew they were taking place.

The jury obviously did not believe that Arthur Young put the board on "full notice" of the Co-Op's financial condition. Though Arthur Young did reveal some information, it concealed many material facts, including the fraudulent decisions that went into the drafting of the financial statements. Arthur Young thereby prevented anyone else from knowingly adopting the statements on the Co-Op's behalf.

(4) *'Selling' demand notes.* It is true that Arthur Young did not physically sell demand notes to individual members of the Class. But Arthur Young's creation and presentation of the Co-Op's financial information was far more important to the Co-Op's note program than any one note sale to a Class member. It was Arthur Young's persistent depiction of the Co-Op as a solvent entity that allowed the Co-Op to continue to make note sales and keep the Co-Op afloat for over two years. As the Eighth Circuit found, "Arthur Young had to know that good news about the Co-Op's finances, or even the lack of bad news, would cause people to invest in the Co-Op." (JA 306.) Indeed, the Eighth Circuit went even further by holding that "Arthur Young 'materially aided' in the sale of demand notes." (JA 287.)

* * *

All of these facts must be viewed in a light favorable to us, with all reasonable inferences drawn our way. Although persons in addition to Arthur Young were associated with the Co-Op and although some of them had significant responsibilities, only Arthur Young was involved in the creation and presentation of the critical financial information, only Arthur Young originated the fraud, and only Arthur Young maintained it for nearly three years. At the very least, there is a question of material fact as to whether Arthur Young "participated," "directly or indirectly," in the "conduct" of this most important part of the Co-Op's "affairs."

III. ARTHUR YOUNG CANNOT NOW RAISE ISSUES NOT INCLUDED IN ANY CERTIORARI PETITION AND NOT DECIDED BY ANY LOWER COURT.

"Only the questions set forth in the petition [for a writ of certiorari], or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Respondent may not "raise additional questions or change the substance of the questions already presented," Sup. Ct. R. 24.1(a), 24.2, even to include "complementary" or "related" issues. *Yee v. City of Escondido, Cal.*, ___ U.S. ___, 112 S. Ct. 1523, 1533-34 (1992); *Air Courier Conf. of America v. American Postal Workers Union*, ___ U.S. ___, 111 S. Ct. 913, 917 (1991); *Kamen v. Kemper Fin. Services*, ___ U.S. ___, 111 S. Ct. 1711, 1716-17 n.4 (1991). "The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor*

v. Freeland & Kronz, ___ U.S. ___, 112 S. Ct. 1644, 1649 (1992).

A. Arthur Young's "Pattern" Argument

Whether Arthur Young's securities frauds may constitute a "pattern" under section 1962(c) "is not the question presented by the petitioners in this case"; that Arthur Young admits. (AY Br. 43.) Arthur Young's own petition raised only securities law issues, and Arthur Young declined to file a cross-petition on the RICO issues it now seeks to interject.

The district court decided the pattern issue under the Eighth Circuit rule overruled in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 235 (1989). Accordingly, no court has applied *H.J. Inc.* to the facts here (nor have the parties taken discovery on any matters newly-relevant under *H.J. Inc.*) If the Court does not ordinarily make decisions without "lower court opinions squarely addressing the question," *Yee*, 112 S. Ct. at 1534; *Taylor*, 112 S. Ct. at 1649; *Air Courier*, 111 S. Ct. at 913, that result is especially appropriate on an issue so complex and fact-intensive.[7]

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[7] Arthur Young contends that its fraudulent acts were not "continuing" within the meaning of *H.J. Inc.* because they encompassed only "a few months" and consisted of "one accounting decision concerning one asset of one company." (AY Br. 44.) The gasohol plant alone embraced events from late 1981 until early 1984 and included two false annual financial statements, deceptions at two annual meetings, deceptions at numerous regular and special board meetings, and deception of a federal

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B. Arthur Young's Constitutional Vagueness Claim

Arthur Young asks the Court to hold RICO unconstitutional on vagueness grounds. Since there is no First Amendment issue, this "vagueness claim must be evaluated as the statute is applied to the facts of this case." *Chapman v. United States*, ___ U.S. ___, 111 S. Ct. 1919, 1929 (1991) (citing *United States v. Powell*, 423 U.S. 87, 92 (1975)). No court in this case could make such an evaluation because Arthur Young never raised the issue until after the Eighth Circuit's first decision was reversed by the Court and the case was remanded. The Eighth Circuit totally ignored the argument thus improperly injected.

Not only did Arthur Young waive the issue, *Daley v. Webb*, 885 F.2d 486, 488 (8th Cir. 1989); *Rogers v. Masem*, 788 F.2d 1288, 1292 (8th Cir. 1985), but, as in *Singleton v. Wulff*, 428 U.S. 106, 119-20 (1976), the Court can "have no idea what evidence, if any, petitioner would, or could,

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agency. And Arthur Young committed many frauds totally unrelated to the gasohol plant. There is the $1.5 million note discussed at Pet. Br. 15 and CAJA 90; the self-dealing transactions for which White was convicted; and the concealment of the Co-Op's payment of fees to White's lawyers, Ball & Mourton, and experts, Arthur Young. These facts present a *prima facie* case of "continuity." *See Swistock v. Jones*, 884 F.2d 755, 759 (3d Cir. 1989) (conduct lasting fourteen months sufficient to fulfill continuity requirement); *Shearin v. E.F. Hutton Group*, 885 F.2d 1162, 1166 (3d Cir. 1989) (two years); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 994 (8th Cir. 1989) (three years). *See generally* Pet. Br. 6-18 for more pattern evidence although, on remand, we would seek additional discovery.

offer in defense of this statute . . . this is because petitioner has had no opportunity to proffer such evidence."[8] *Accord Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 & n.23 (1989) ("absence of a developed record on [constitutional] issues" belatedly raised provides good reason not to decide such issues).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and remand the case for further proceedings on the Class' RICO claim.

Respectfully submitted,

ROBERT R. CLOAR
Court Plaza
Suite 102
51 South 6th Street
Fort Smith, AR 72901
(501) 783-1186

GARY M. ELDEN
(Counsel of Record)
JOHN R. MCCAMBRIDGE
JAY R. HOFFMAN
GRIPPO & ELDEN
227 West Monroe Street
Chicago, IL 60606
(312) 704-7700

Counsel for Petitioners

[8] The 20 pages allotted for us to respond to over 100 pages of amici and respondent's briefs obviously leaves us no space to deal with the merits of two such far-reaching claims as the ones newly raised by Arthur Young. If for some reason the Court wants to decide either on the merits, we respectfully ask leave to file an additional brief addressing these issues.